HOUSE OF COMMONS
CANADA

REPORT ON

THE SPECIAL IMPORT MEASURES ACT

BY

THE SUB–COMMITTEE ON THE REVIEW OF THE SPECIAL IMPORT MEASURES ACT
OF
THE STANDING COMMITTEE ON FINANCE

THE SUB–COMMITTEE ON TRADE DISPUTES
OF
THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE

DECEMBER 1996

Publications Service

REPORT ON

THE SPECIAL IMPORT MEASURES ACT

BY

THE SUB–COMMITTEE ON THE REVIEW OF THE SPECIAL IMPORT MEASURES ACT
OF
THE STANDING COMMITTEE ON FINANCE

THE SUB–COMMITTEE ON TRADE DISPUTES
OF
THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE

DECEMBER 1996

Available from Canada Communication Group — Publishing, Public Works and Government Services Canada, Ottawa, Canada K1A 0S9

HOUSE OF COMMONS

Issue No. 1

Monday, December 9, 1996

Chairman: Ron Duhamel

CHAMBRE DES COMMUNES

Fascicule nº 1

Le lundi 9 décembre 1996

Président: Ron Duhamel

Minutes of Proceedings of the Sub-Committee on

Special Import Measures Act

Standing Committee on Finance

Procès-verbaux et du Sous-comité sur la

Loi sur les mesures spéciales d'importation

Comité permanent des finances

RESPECTING:

Review of the *Special Import Measures Act*

INCLUDING:

Final Report

CONCERNANT:

Examen de la *Loi sur les mesures spéciales d' importation*

Y COMPRIS:

Rapport final

Second Session of the Thirty-fifth Parliament, 1996

Deuxième session de la trente-cinquième législature, 1996

HOUSE OF COMMONS

Issue No. 2

Monday, December 9, 1996

Chairman: Hon. Michel Dupuy

CHAMBRE DES COMMUNES

Fascicule nº 2

Le lundi 9 décembre 1996

Président: L'hon. Michel Dupuy

Minutes of Proceedings of the Sub-Committee on

Trade Disputes

Standing Committee on Foreign Affairs and International Trade

Procès-verbaux du Sous-comité sur

Les différends commerciaux

Comité permanent des affaires étrangères et du commerce international

RESPECTING:

Review of the *Special Import Measures Act*

INCLUDING:

Report on SIMA

CONCERNANT:

Examen de la *Loi sur les mesures spéciales d'importation*

Y COMPRIS:

Rapport sur la LMSI

Second Session of the Thirty-fifth Parliament, 1996

Deuxième session de la trente-cinquième législature, 1996

Sub-Committee on the Review of the Import Measures Act of the Standing Committee on Finance

Chair: Ron Duhamel, M.P. for St. Boniface

MEMBERS

Herb Grubel, M.P. for Capilano—Howe Sound
Yvan Loubier, M.P. for Saint-Hyacinthe—Bagot
Brent St. Denis, M.P. for Algoma
Susan Whelan, M.P. for Essex—Windsor

Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade

Chair: Hon. Michel Dupuy, M.P. for Laval West

MEMBERS

Sarkis Assadourian, M.P. for Don Valley North
Ron MacDonald, M.P. for Dartmouth
Charlie Penson, M.P. for Peace River
Benoît Sauvageau, M.P. for Terrebonne
Bob Speller, M.P. for Haldimand—Norfolk

CLERK OF THE SUB-COMMITTEES

Georges Etoka

RESEARCH STAFF OF THE SUB-COMMITTEES

Consultant: Dr. Gilbert Winham

From the Library of Parliament: Me Daniel Dupras

Co-Chairs' Foreword

On May 17, 1996, Finance Minister Paul Martin asked the Standing Committees on Finance and on Foreign Affairs and International Trade of the House of Commons to jointly review the *Special Import Measures Act* (SIMA) and to advise the Government if any changes should be made to the law. The Standing Committee on Finance subsequently struck the Sub-Committee on SIMA Review, and the Standing Committee on Foreign Affairs and International Trade assigned its Sub-Committee on Trade Disputes to work jointly with the Sub-Committee on SIMA Review to carry out this task.

SIMA governs the application of anti-dumping and countervailing duties to imports of dumped and subsidized goods that are found to cause injury to domestic producers. Anti-dumping duties are additional duties designed to offset an exporter's under pricing in an importing country's market. Countervailing duties are designed to offset the effects of foreign subsidies on imported products. The SIMA legislation is an important component of Canadian import policy.

Since the establishment of SIMA in 1984, Canada's trading regime has undergone significant changes. These result from the increasing globalization that affects all national economies, and from the completion of three historic international trade agreements. Following the Canada–U.S. Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA), Canada moved to implement into legislation the unique binational review procedures on anti-dumping and countervailing duties contained in those agreements. After the Uruguay Round of Multilateral Trade Negotiations, Canada implemented the international codes on anti-dumping and subsidy practices concluded in that negotiation. Given these changes and the decade or more of experience with the current legislative framework, a review of SIMA is timely to determine whether it is still relevant to the competitive needs of all segments of the Canadian business community.

As drafted in 1984, SIMA represented a balance of interests between those parties requiring protection from injurious dumped or subsidized imports, and those requiring access to imports to ensure profitability of their economic activities. The main question we address is whether the current law adequately serves those firms that are being injured by dumped or subsidized imports, as well as those domestic interests that may be adversely affected by anti-dumping or countervailing duty actions. In short, we sought to establish whether the balance struck in 1984 continues to be appropriate in the new economic situation of the 1990s.

Our conclusion, which will be elaborated below, is that the basic circumstances that motivated Canada to establish SIMA continue to exist, and that the legislation continues to respond to those circumstances. The Law provides basic protection to Canadian producers while limiting unnecessary collateral damage to downstream users. During our hearings and deliberations, we became aware of several areas where adjustments might make the legislation more efficient or more

responsive to Canada's economic needs, and we have focused our recommendations on these areas. These recommendations constitute suggestions for incremental improvements to legislation that is already adequately serving Canada's national economic interests.

We are grateful to the members of the Sub-Committee on the SIMA Review, and to the members of the Sub-Committee on Trade Disputes, and to other members of the House of Commons, who assisted with this report. These individuals include: Barry Campbell, Parliamentary Secretary to the Minister of Finance; Ron MacDonald, Parliamentary Secretary to the Minister of International Trade; Bill Graham, Sarkis Assoudourian, Brent St. Denis, Susan Whelan, Roy Cullen, Bob Speller, Yvan Loubier, Benoît Sauvageau, Herb Grubel and Charlie Penson. We appreciate the efforts of those who either appeared before us or submitted briefs; these individuals or organizations are noted in Appendices A and B. We acknowledge with thanks the efforts of staff who contributed to this report, namely our Clerk, Georges Etoka and our consultant Gilbert Winham, assisted by our research officer from the Library of Parliament, Me Daniel Dupras.

We submit this report in the expectation that it is but one step in the continuing process of adjusting Canada's internal legislation and administrative practices to an evolving external environment. The Government should be prepared to revisit this subject as needed to keep Canadian policies abreast of a changing international economy and the potential for reform of national practices.

The Standing Committee on Finance

has the honour to present its

SIXTH REPORT

In accordance with its Order of reference of Wednesday, June 5, 1996, Your Committee assigned responsability for a joint review of the *Special Import Measures Act* to a Sub-Committee.

The Sub-Committee on the Review of the *Special Import Measures Act* has submitted its final report to the Committee. Your Committee has adopted this report without amendment and asks that the government consider the advisability of implementing the recommendations contained in the Report. The full text of the report appears in Issue No. 1 of the Sub-Committee on the Review of the *Special Import Measures Act*.

The Standing Committee on Foreign Affairs and International Trade

has the honour to present its

FOURTH REPORT

In accordance with its Order of Reference of Thursday, May 9, 1996, your Committee assigned responsability for a joint review of the *Special Import Measures Act*, to a Sub-Committee.

The Sub-Committee on Trade Disputes has submitted its final report to the Committee. Your Committee has adopted this report without amendment and asks that the government consider the advisability of implementing the recommendations contained in the Report. The full text of the report appears in Issue No. 2 of the Sub-Committee on the Trade Disputes.

Table of Contents

Summary of Recommendations

1. The Sub-Committees recommend that the SIMA legislation and process be continued, subject to the modifications addressed in this report.

2. The Sub-Committees recommend, that Revenue Canada take concrete measures to insure fair and equal access to the SIMA process by small and medium-sized Canadian producers.

3. The Sub-Committees recommend that the CITT be given the responsibility for making the preliminary determination of injury.

4. The Sub-Committees recommend that SIMA should be amended to provide counsel increased access to confidential information in anti-dumping/countervailing duty investigations conducted by Revenue Canada.

5. The Sub-Committees recommend that appropriate changes be made to Canadian trade legislation to permit access by experts to confidential information in SIMA proceedings before the CITT.

6. The Sub-Committees recommend the inclusion in SIMA Regulations the fact of dumping in third country markets as evidence of threat of future injury.

7. The Sub-Committees recommend that Revenue Canada make allowance in regulations to accommodate representations from interested parties when undertakings are being considered.

8. The Sub-Committees recommend that section 53(2) of SIMA be amended to allow the Deputy Minister of National Revenue to review and terminate undertakings before five years.

9. The Sub-Committees recommend that SIMA be amended to make cumulation mandatory in the CITT's procedures for determining injury.

10. The Sub-Committees recommend no change from the prospective method of duty assessment.

11. The Sub-Committees recommend that the Minister of Finance reform SIMA provisions for the conduct of interim and expiry reviews, in light of the comments made above, and in this context, to bifurcate the administrative responsibilities for the conduct of such reviews.

12. The Sub-Committees recommend that section 76 of SIMA be amended to require the CITT to assess the cumulative injurious effects of dumping/subsidizing in conducting interim and expiry reviews.

13. The Sub-Committees recommend that a non-exclusive list of factors be included in section 45 of SIMA that would guide the CITT respecting whether and how to conduct a public interest inquiry.

14. The Sub-Committees recommend that the CITT's decision, that an anti-dumping or countervailing duty might not be in the public interest, should be a formal decision reviewable by a Federal Court. The level of any duty reduction should continue as at present in section 45 of SIMA to be a report to the Minister of Finance.

15. The Sub-Committees recommend that the lesser duty concept as provided in Article 9.1 of the WTO Anti-dumping Agreement be incorporated in section 45 of SIMA provisions for public interest.

16. The Sub-Committees recommend that the Minister of Finance consider amending SIMA to allow for the temporary exemption of goods from anti-dumping/ countervailing duty orders under conditions of domestic short supply.

I. Introduction

(I) The SIMA Process

The *Special Import Measures Act* (SIMA) is the principal legal instrument governing the use of anti-dumping and countervailing duties.[1] The Department of Finance is responsible for the elaboration of SIMA policy and legislation. Revenue Canada and the Canadian International Trade Tribunal (CITT) are responsible for administering the SIMA system.

Canada operates a partially bifurcated trade remedies system under SIMA. The Deputy Minister of National Revenue is responsible for initiating investigations and making preliminary and final determinations respecting dumping/subsidizing and preliminary determinations of injury. The Canadian International Trade Tribunal (CITT) is responsible for making final injury determinations. Under normal circumstances, SIMA requires that the investigation process, from initiation to final order, be completed within 210 days.

Under SIMA, a Canadian industry is entitled to trade remedy assistance if it is established, through a formal investigation, that the imports are being subsidized or dumped and that the subsidizing or dumping has caused or threatened to cause injury. Revenue Canada receives complaints from Canadian producers and determines whether these are properly documented. Once a properly documented complaint is received, the Department has normally 30 days to decide whether or not to initiate an investigation; see Graph 1. In making this decision, Revenue Canada must have a reasonable indication of injury, and subsidization or dumping.

Revenue Canada will, normally within 90 days of initiating an investigation, terminate the investigation either because there is no significant amount of dumping/subsidization found or no evidence of injury. Alternatively, they will issue a preliminary determination of dumping/subsidizing and a reasonable indication of injury. If a preliminary determination is made, provisional duties will be levied on dumped/subsidized imports to protect the Canadian industry pending completion of the investigation.

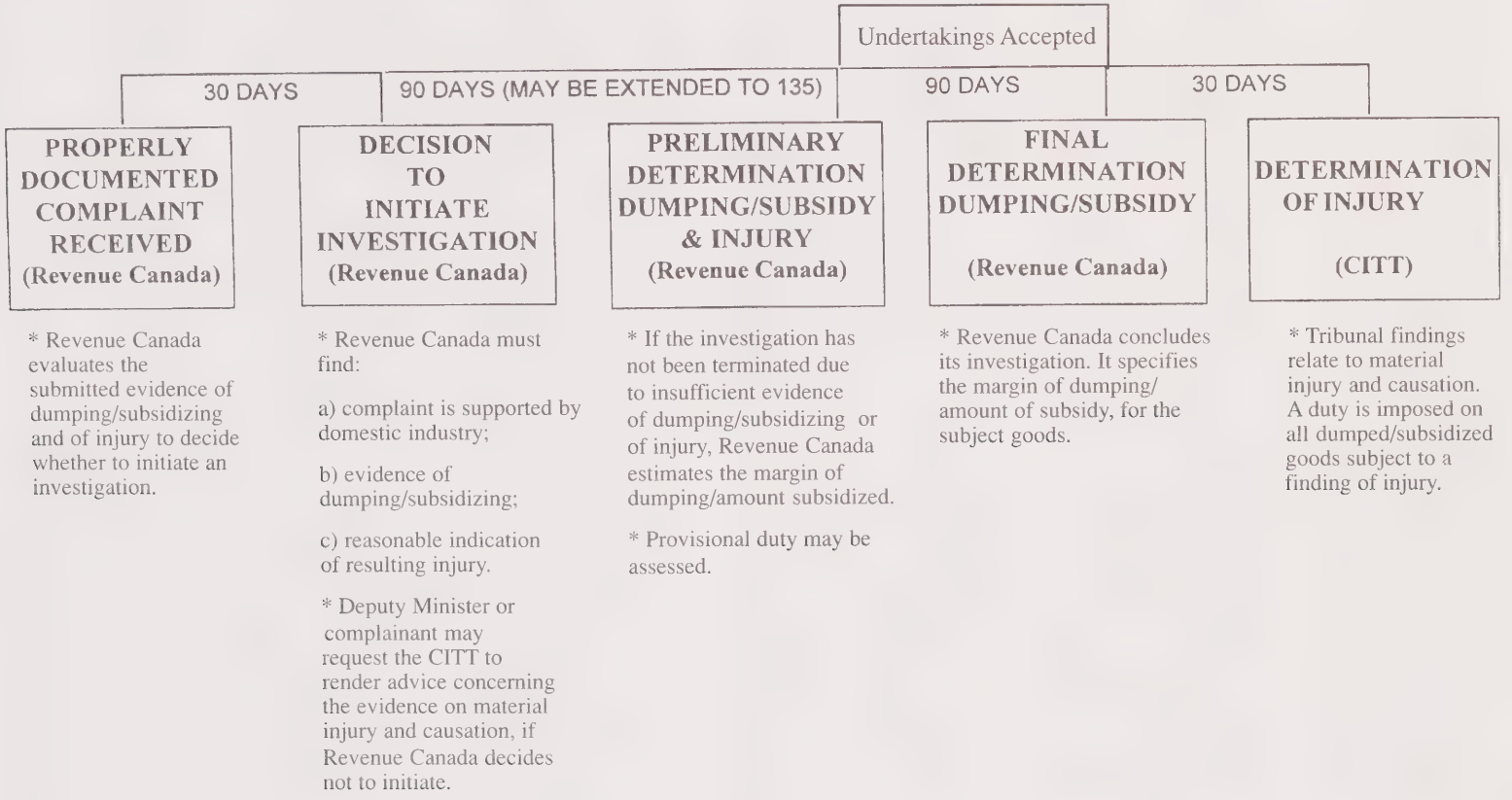
After a preliminary determination, foreign exporters or governments can offer undertakings aimed at eliminating the dumping/subsidizing or injury to the Canadian industry. Where undertakings are accepted by Revenue Canada, the investigation is normally suspended and no provisional duties are collected while the undertakings are in force.

---

1 *Special Import Measures Act*, R.S.C., 1985, ch. S-15.

Graph 1

The *SIMA* Process



Where an investigation is not suspended as a result of undertakings, Revenue Canada will continue its investigation respecting dumping/subsidizing and issue a final determination within 90 days of the date of the preliminary determination. This final determination will specify the precise margin of dumping or amount of subsidy. The basis of the decision will be the data received from the parties, along with any third-party submissions. The final determination on dumping/subsidizing or the decision to terminate an investigation is the final step in the SIMA process involving Revenue Canada.

The CITT is an independent quasi-judicial body responsible for making a final determination on injury. If the CITT finds that injury has been caused to the domestic industry, definitive anti-dumping/countervailing duties are normally levied on all goods imported on or after the date of the preliminary determination. Where the CITT finds that the dumped/subsidized imports have not caused injury but are threatening to do so, anti-dumping/countervailing duties are levied on those goods imported after the date of the CITT's decision, with any (provisional) duties collected prior to that date being refunded.

Anti-dumping and countervailing duty orders terminate after five years, unless the CITT decides, pursuant to a review initiated prior to the order, that there is likely to be a continuation or recurrence of dumping/subsidizing and injury. SIMA also provides the authority for the CITT to conduct public interest investigations once a positive injury finding is made.

(II) Anti-Dumping and Countervailing Duty Actions

As with many industrial countries, Canada uses anti-dumping measures more than any other trade remedy. During the period 1992-95, Revenue Canada received approximately 170 complaints and initiated 31 cases. Thirty of these cases received a positive preliminary determination from Revenue Canada and four cases were resolved through price undertaking agreements. The remaining 26 cases continued to the injury inquiry stage where the CITT made 18 positive injury determinations and found no injury in 8 cases.

The result of this activity was that by the end of 1995, 90 anti-dumping duties were in force in Canada, which made Canada rank third among the World Trade Organization (WTO) members.[2] By comparison, in 1995 the United States had 305 anti-dumping measures in force; the European Union, 178; Australia, 86; and Mexico, 42.

While subject to the same framework provisions as anti-dumping measures, countervailing actions have been relatively rare in Canada. At end-1995, Canada had six measures in force, affecting mainly farm exports of the European Union (EU) or individual EU member states. Of

---

2 Anti-dumping duty orders can apply minimally to one exporter in one country, or to combinations of exporters and countries. The figure 90 is derived from 37 current orders extended over a number of exporters and countries.

these, four were introduced in the mid-1980s and have been renewed ever since. Among the initiations since January 1994, subsidized sugar from the European Union was found to have been threatening injury, while an investigation into subsidized sugar from the United States was terminated because subsidies were found to be negligible. However, an anti-dumping measure is in place against the United States on sugar.

It is important to note that from the perspective of the Canadian economy, trade remedy actions have had relatively small impact. During the period 1991-94, anti-dumping actions affected about $1 billion of imports per year on average, or one per cent of total imports into Canada. Dumping margins were highly variable, however, ranging from 5.5% to 64.29%, with an average of 37%. These duties have a substantial impact in the industries where they occur.

There has been a downward trend in the trade remedy cases initiated under SIMA since the mid-1980s, with the exception of a cluster of cases in 1994. For example, between July 1994 and June 1995, Canadian agencies initiated nine anti-dumping investigations (excluding review cases), followed by six investigations over the period until June 1996. Similarly, the United States has not initiated a new case against Canada since the completion of the Uruguay Round agreements in December, 1993. It is too early to tell if this recent trend will continue into the future.

(III) The International Framework

The circumstances under which trade remedy actions can be taken and rules respecting the conduct of investigations are largely governed by the World Trade Organization (WTO) Agreements of 1994, two of those are of particular importance in the SIMA context, the WTO Subsidies Agreement[3] and the WTO Anti-dumping Agreement.[4] Key provisions of these Agreements include methods for determining the existence of dumping and countervailable subsidies, requirements for the initiation of investigations, obligations respecting procedural fairness, duration of orders, and transparency in decision-making. In addition, these Agreements set out the economic factors to be considered in determining whether injury exists and whether or not such injury is caused by dumped or subsidized imports.

Canada is obliged in making alterations to SIMA to respect the previously negotiated limitations of the WTO Agreements. Were Canada not to do this, it would be liable to an adverse ruling by a dispute settlement panel, and even to the imposition of trade sanctions by its trading partners.

---

[3] Agreement on Subsidies and Countervailing Measures, (being part of), Annex 1A, of the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negociations, Marrakech, Apr. 15, 1994, (reprint in), The Results of the Uruguay Round of Multilateral Trade Negociations, GATT Secretariat, Geneva 1994. (Hereinafter, WTO Subsidies Agreement).

[4] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade — 1994, (being part of), Annexe 1A, of the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negociations, Marrakech, Apr. 15, 1994, (reprint in), The Results of the Uruguay Round of Multilateral Trade Negociations, GATT Secretariat, Geneva, 1994. (Hereinafter, WTO Anti–Dumping Agreement).

Since SIMA's establishment, important steps have been taken to liberalize Canada's trade through regional free trade agreements, although these liberalization initiatives have not led to fundamental changes in the trade remedy framework. For Canada, concerns about the use of trade remedies within hemispheric free trade areas have become particularly acute given the importance of access to the U.S. market for Canadian exports and the high level of economic integration between the Canadian and U.S. markets. Many firms have organized their operations on a continental basis and goods often move back and forth across the Canada-U.S. border several times before they are incorporated into final products. U.S. anti-dumping or countervailing duty actions against Canadian exports can thus impair access to the large U.S. market and undermine economic benefits provided by the NAFTA.

Although Canada would like to eliminate anti–dumping remedies in the context of free trade areas, (as it has been demonstrated in the Free Trade Agreement with Chile), the Sub-Committees are of the opinion, after having heard testimonies on this subject, that the elimination of anti-dumping remedies even though this would be the ideal, is unrealistic in the short and medium term without endangering Canadian industries. Thus far, the U.S. government and U.S. industry have not been receptive to Canadian efforts to seek alternative arrangements or substantive reforms to existing trade remedy laws.

(IV) The SIMA Review Process

SIMA was initiated in 1984 to consolidate and modernize Canada's trade remedy laws. Instrumental in the establishment of SIMA were the *Proposal on Import Policy*, a discussion paper of the Department of Finance of July 1980, and the 1982 Report of the Parliamentary Sub-Committee chaired by the Honourable Bryce Mackasey, P.C. This report brought forward key principles and recommendations aimed at improving the accessibility and effectiveness of the trade remedy system while ensuring greater transparency and equity to all affected parties.

In 1988, Revenue Canada undertook a study evaluating the administration of SIMA. This study addressed operational issues such as disincentives to use SIMA, the level of compliance by importers, and organizational procedures and human resources.

The Department of Finance commenced a policy review of SIMA in 1991, but this was suspended pending the outcome of the Uruguay Round of GATT Multilateral Trade Negotiations. Subsequently, substantial changes were made to SIMA in 1994 to implement Canada's obligations pursuant to the Uruguay Round Agreements. These changes included important issues such as definition of subsidies, injury determination, and procedures for establishing dumping margins.

In his 1992 Report, the Auditor General of Canada noted that since 1984 when the SIMA legislation came into force, the Department of Finance had not completed a formal policy evaluation of the positive and negative effects of the legislation. The Auditor General stated that:

> Such evaluation effort is needed to determine if the balance of rights and obligations established in 1984 continues to be appropriate in the present trade environment and in the foreseeable future.[5]

The Auditor General concluded that the government authorities, industries seeking trade remedy assistance, and others that may be affected by such measures, had gained sufficient experience to permit a timely assessment of the legislation's effectiveness.

Two Sub-Committees were established in May and June 1996, with a mandate to jointly conduct hearings and to report to Parliament in December 1996. In carrying out this mandate the Sub-Committees have conducted nine hearings, heard testimony from 32 individuals or groups, and received written briefs from an additional 8 individuals or groups. The Sub-Committees have further benefitted from comments made by the agencies responsible for administering the legislation.

(V) Overall Assessment of the Sub-Committees

The conclusion of the Sub-Committees following the completion of the hearing process is that SIMA is working well and continues to be relevant to the competitive needs of the Canadian business community. The legislation adequately protects those firms being injured by dumped or subsidized imports, while at the same time it accounts for the potential negative effects of anti-dumping and countervailing duty actions on consumers and downstream industries. Therefore, **the Sub-Committees recommend that the SIMA legislation and process be continued, subject to the modifications addressed in this report. (1)**

There was considerable evidence for the above recommendation. The majority of witnesses who appeared before the Sub-Committees expressed support for SIMA. For example, the Canadian Sugar Institute states: "Based on CSI's experience, it is our view that the existing law is generally effective and well administered."[6] The Canadian Carpet Institute stated it "considers SIMA to be an effective and necessary piece of legislation."[7] Even the Canadian Steel Producers Association and the Automotive Parts Manufacturers Association that were critical of SIMA nevertheless voiced support for the legislation. The Canadian Steel Producers Association stated: "Overall the Canadian

---

5 *Report of the Auditor General of Canada to the House of Commons 1992*, Chapter 19 — Department of National Revenue — Customs and Excise, *Special Import Measures Act*, p. 461.

6 Brief of the Canadian Sugar Institute of October 30, 1996.

7 Brief of the Canadian Carpet Institute.

system has served Canada well. This brief therefore proposes incremental rather than fundamental changes."[8] And the Automotive Parts Manufacturers Association stated: " . . . the majority of member companies responding to a survey reported that the law has worked for them."[9]

The views quoted above are further supported by many other direct statements, and by a number of submissions seeking no change at all or merely minor adjustments.

However, there were a number of proposals for changes to SIMA. It is the opinion of the Sub-Committees that these proposals did not represent opposition to SIMA, but were rather an attempt to modify the balance struck between producers and downstream users of imported products and consumers. Further, the proposals addressed dissimilarities between the Canadian and U.S. trade remedy systems, or were intended to improve procedural aspects of SIMA administration. These proposals are addressed in the various sections below.

The report which follows is organized around the chronology of the SIMA process, namely, the initiation of an investigation through the preliminary determination; the final determination; enforcement procedures; reviews; and public interest and other matters.

---

8 Brief of the Canadian Steel Producers Association of October 30, 1996.

9 Brief of the Automotive Parts Manufacturers Association of October 30, 1996, Appendix A.

II. Preliminary Stages of Investigation

(I) The Present System

The SIMA process normally begins with a complaint from domestic producers to Revenue Canada that dumped/subsidized goods are causing injury. Such a complaint must be accompanied by supporting evidence and documentation. Personnel from Revenue Canada will frequently assist Canadian producers, especially small companies that may lack resources, to properly document their complaint.

At this point of the process, SIMA is not designed to be adversarial and additional time is not permitted for consideration of opposing interests. The Deputy Minister, in order to verify the information contained in a complaint, may consider an unsolicited third party communication which bears on a fundamental aspect of the complaint. Where an unsolicited third party communication raises a question about the complaint, the Deputy Minister can seek additional information from the complainant.

Once a properly documented complaint is received, the Department has 30 days, (which may be extended to 45 days in certain cases), to decide whether to initiate an investigation. The Deputy Minister must assess whether:

(a) the complaint has been made by or on behalf of the domestic industry;

(b) there is sufficient evidence that the imports are being dumped or subsidized; and

(c) there is a reasonable indication that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury.

For an investigation to start, the complaint must be supported by producers who represent 25% or more of the total Canadian production of the goods in question, and producers who support the complaint must have greater total production than those who oppose it.

There must be sufficient evidence of dumping or subsidizing, and sufficient evidence of injury to a major proportion of the total domestic production, for an investigation to proceed. Revenue Canada will determine "major proportion", which may be less than 50%, of the total domestic production, on a case by case basis.

Revenue Canada has the requisite expertise to evaluate evidence of dumping/subsidization, but it operates in more of a generalist role in evaluating evidence of injury. In recognition of the CITT's expertise in injury determinations, the SIMA includes various provisions which allow the Deputy Minister and other interested parties to seek the "advice" of the Tribunal on the issue of injury during the pre-initiation phases.

Once a decision to initiate an investigation has been made, whether by Revenue Canada or the CITT upon referral, written notice is given in the *Canada Gazette* and is also sent to interested parties. In the case of a dumping investigation, a copy of the non-confidential version of the complaint is sent to the foreign government and, where practicable, is provided to all known exporters or their trade associations.

The purpose of the investigation is to obtain detailed information. During the preliminary investigation, the Deputy Minister re-examines all of the evidence of injury contained in the original complaint or obtained elsewhere. The circumstances prevailing in individual cases impose particular operational requirements and thus no two investigations are the same.

At the time of the initiation, all known importers, exporters and, in a subsidy investigation, the foreign governments, are asked for information. The request describes in detail the data which must be submitted by the exporter or importer to allow Revenue Canada to determine normal values, export prices and margins of dumping and amounts of subsidy. The request for information also provides an opportunity for exporters to fully explain and document their pricing practices on sales to Canada. Failure to provide the information will oblige Revenue Canada to proceed on the basis of the facts available at the time.

The purpose of seeking information is to substantiate the data supplied by the exporter respecting sales to importers in Canada, including the export price. Exporters and foreign governments are allowed 37 days in which to respond. If the respondent's submission is incomplete, the missing information will be requested again and the respondent advised of the steps required to make the submission acceptable.

Following the receipt of information, the preliminary determination process begins. This decision, required within 90 days of initiation, is based as much as possible on verified data which may require on-site visits to check and validate information. Upon verification of data, all information is analyzed in detail and normal values and export prices, margins of dumping, or amounts of subsidy are estimated.

A preliminary decision is made within 90 days on dumping and subsidization, and on injury. If unusual circumstances exist, SIMA allows for an extension to 135 days depending on:

- the complexity or novelty of the issues;
- the variety of the goods or the number of persons involved;
- the difficulty of obtaining satisfactory evidence;
- any other circumstances which make it unusually difficult to arrive at a decision.

If a preliminary determination is made of injurious dumping or subsidizing, the Deputy Minister:

- estimates the margin of dumping or the amount of the subsidy for each exporter of goods, using the information available;
- specifies or describes the goods to which the determination is made;
- where the subsidy is in whole or in part a prohibited subsidy, estimates the amount which is a prohibited subsidy; and
- informs the Tribunal of the preliminary results of the investigation in order that it may commence its inquiry as to whether injury is being caused to production in Canada.

Following a preliminary determination, all dumped or subsidized imports from the countries involved in the investigation may be subject to provisional duties, which are collected from the preliminary determination to the date of the CITT's final determination on injury. Provisional duties are based on the estimated margin of dumping or the estimated amount of subsidy on the imported goods.

(II) Summary of Proposals and Recommendations

Pre-Initiation Notification and Preliminary Determination

A number of witnesses who appeared before the Sub-Committees were concerned with the manner in which the SIMA process operates following the receipt of a complaint. The view was expressed that SIMA required some sort of mechanism through which unwarranted complaints could be filtered out at an early stage in the process. For example, the Canadian Importers Association noted that in the last four anti-dumping cases heard by the CITT, findings of no injury were determined, and that if Revenue Canada had earlier access to such information the cases might not have proceeded thereby saving time and expense. The Association proposed additionally that SIMA require input from importers and exporters when presented with a complaint by Canadian producers.

A related point was that the CITT should be brought more quickly into the SIMA process. For example, the Canadian Sugar Institute proposed that the CITT be granted jurisdiction to conduct a preliminary investigation before the Revenue Canada preliminary determination is made. This would greatly assist in the gathering of critical evidence and the identification of issues.

A number of submissions, including those by the Retail Council of Canada and the Canadian Importers Association, suggested that interested parties should be given notice of a complaint and should be involved in the process by which the Deputy Minister decides whether to initiate an investigation. This proposal is precluded by Article 5.5 of the WTO Anti-dumping Agreement,

which states that: "The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation." The proposal to give notice of a complaint was motivated by a desire to improve the precision and adequacy of the information used in trade remedy cases, but another way must be found to address this problem.

Yet another issue was access to the SIMA process, which was a particular concern of the Canadian Federation of Agriculture. While many of the submissions made some reference to the cost and burden of the process, the Canadian Federation of Agriculture was especially concerned with the inability of small producers to have viable access. It was proposed, to insure that such producers have fair and equal access to the trade remedies provided by SIMA, that consideration be given to measures that could assist in the documentation of their cases and in reducing the costs to participate in the processes, without compromising the integrity of the system. It was noted that unlike other primary industries, agriculture production is not carried out by large corporations. Most producer organizations do not have the in-house technical skills to do the necessary gathering of information and analysis. The legal costs alone, associated with dealing with a prolonged process of investigation and review, may be prohibitive for small agricultural, and other, sectors.

In response to the above concerns and proposals, **the Sub-Committees recommend, first, that Revenue Canada take concrete measures to insure fair and equal access to the SIMA process by small and medium-sized Canadian producers. (2)** At present, Revenue Canada has indicated that equal access is one of its priorities in administering SIMA, and that it accomplishes this goal by serving as a single port of entry to the SIMA system, and by proactively assisting small and medium-sized producers during the pre-initiation process. The Department should continue with these efforts.

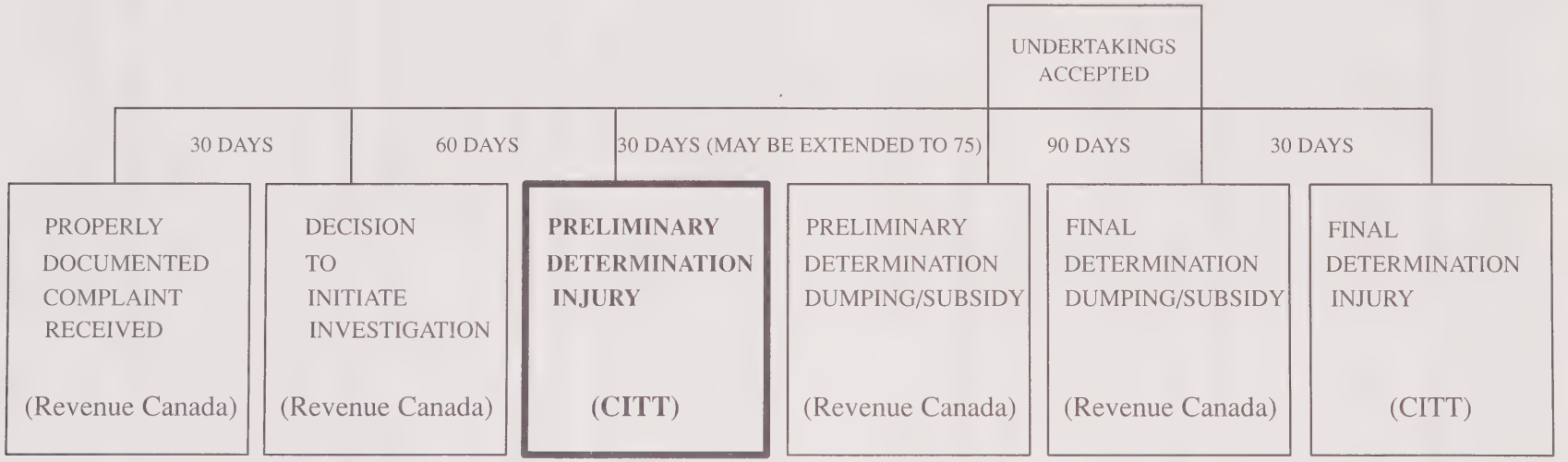
Second, in an effort to improve the efficiency and fairness of the SIMA process, **the Sub-Committees recommend that the CITT be given the responsibility for making the preliminary determination of injury. (3)** This would create a more fully "bifurcated" system for administering trade remedies in Canada, and would more closely resemble the model used in the United States. The highlights of this model are shown in Graph 2.

The adoption of a bifurcated model would not affect the pre-initiation stage. Revenue Canada would continue to receive complaints and to be responsible for the decision to initiate an investigation. Therefore, there would still be a single filing point for complaints to minimize cost and paper-burden. Revenue Canada would continue to provide assistance in the preparation of complaints and would remain solely responsible for determining properly documented complaint and whether the complainant has standing.

Following initiation of an investigation, Revenue Canada would transmit the injury portion of the complaint to the CITT. The CITT would then conduct the preliminary injury investigation while Revenue Canada simultaneously began its preliminary dumping investigation. Each authority would concentrate on its area of expertise. There would be no substantive change in the information a complainant would have to submit nor any additional burden placed on complainants.

Graph 2

Recommended Changes to the *SIMA* Process



* Revenue Canada evaluates the submitted evidence of dumping/subsidizing and of injury to decide whether to initiate an investigation.

* Revenue Canada must find:

a) complaint is supported by domestic industry;

b) evidence of dumping/subsidizing;

c) reasonable indication of resulting injury.

* Deputy Minister or complainant may request the CITT to render advice concerning the evidence on material injury and causation, if Revenue Canada decides not to initiate.

* Tribunal looks for material injury, threat of material injury, or material retardation to the establishment of an industry.

* Notice of decision sent to Revenue Canada.

* Tribunal makes determination on framework issues (e.g., like goods).

* If the investigation has not been terminated due to insufficient evidence of dumping/subsidizing or of injury, Revenue Canada estimates the margin of dumping/amount subsidized.

* Provisional duty may be assessed.

* Revenue Canada concludes its investigation. It specifies the margin of dumping/ amount of subsidy for the subject goods.

* Tribunal findings relate to material injury and causation. A duty is imposed on all dumped/subsidized goods subject to a finding of injury.

Being a quasi-judicial body, the CITT would make the injury portion of the complaint available to all interested parties (with the confidential version being available to counsel). This would make the process more transparent. Interested parties would have the opportunity to make submissions on questions concerning injury and related matters, namely, like goods, classes of goods, the definition of domestic industry, and the adequacy of the injury allegations. The complainant and those supporting the complaint would have the opportunity to respond to such submissions.

The CITT would render its decision within 60 days of the initiation of the preliminary inquiry (30 days before the preliminary determination of dumping is due from Revenue Canada). Revenue Canada would continue its preliminary dumping investigation only where the CITT's preliminary injury determination is affirmative. The CITT would then await the outcome of Revenue Canada's preliminary investigation. If Revenue Canada subsequently made a determination of dumping, the CITT would then initiate an inquiry pursuant to section 42 of SIMA.

While having the CITT make the preliminary injury determination would result in parties having to deal with two administrative authorities earlier in the SIMA process, the Sub-Committees believe that it would result in a more streamlined and efficient system. Parties would make all submissions on injury questions to the CITT. Currently, they make injury submissions to Revenue Canada and then to the CITT. Often they must repeat or modify the submissions originally made to Revenue Canada when they are provided to the CITT in its injury inquiry. Furthermore, because both the dumping investigation and the injury inquiry would be framed more clearly, parties would have a clearer understanding of how the process would be carried out and thus could participate with a greater sense of certainty.

There were several proposals relating to "advice" given by the CITT to Revenue Canada on matters of determining injury. Sections 33, 34, and 35 of SIMA, which allow for references to the CITT for "advice" on injury, would not be necessary under a bifurcated model. Consideration may be given to retaining section 33 references for cases where Revenue Canada decides not to initiate for want of injury.

To sum up, five main arguments for the adoption of a bifurcation model are offered. First, it would reduce institutional duplication. Second, it would give interested parties the opportunity to make submissions on injury in accordance with the due process rules of the CITT, which would promote greater transparency and procedural fairness. Third, it would promote an earlier and more thorough examination of injury, which in turn could lead to unwarranted complaints being dropped or otherwise settled.

Fourth, such a system would facilitate a more consistent treatment between CITT and Revenue Canada of certain framework issues such as the determination of "like goods" and "domestic industry". Fifth, in response to the concerns of the Canadian Federation of Agriculture, the model could accommodate statutorily-mandated expedited procedures for horticultural products to ensure early implementation of provisional duties (e.g. SIMA could be amended to allow injury and dumping/subsidization preliminary determinations in 60 days from initiation for perishable goods).

Questionnaires and Requests for Information

The Automotive Parts Manufacturers Association proposed that the Revenue Canada questionnaire revert to its previous, shorter format. It was argued that the investigation procedure should be as minimally intrusive as possible while still meeting its objective.

Furthermore, it was proposed that companies that did not export during the period in question should not be required to complete a questionnaire as there is no reason to investigate them. It was argued that there is a significant possibility that a company will choose not to complete a questionnaire and opt instead for a ruling against them. As this could result in a price increase or loss of imports in the Canadian market, it was argued to be in the best interests of consumers and downstream producers to limit the requirement to complete questionnaires to relevant firms.

It was further proposed that in cases involving distributors, these firms should only be asked what they paid for their raw materials and the CITT should use this as cost. This recommendation was partly based on the reasoning that distributors often have no access to the production costs of goods they export.

The Sub-Committees note the above concerns are matters of administrative practice rather than changes in SIMA legislation. The response of Revenue Canada to these concerns is that it gathers the information necessary to carry out its responsibilities under the legislation. The Sub-Committees are of the view that these administrative practices are appropriate under the legislation.

Data Collection

The Canadian Steel Producers Association advocates that Revenue Canada be required to disregard unsolicited submissions from parties other than the complainants prior to the initiation of an investigation. However, consideration of such submissions is given by Revenue Canada based on its obligation under the WTO to verify the accuracy of complaints. The Sub-Committees are disinclined to interfere with this issue of administrative practice.

The Canadian Steel Producers Association also argued that Revenue Canada be allowed to make a finding of "massive dumping" at the time of the preliminary determination and to apply duties to the period from the initiation of the complaint. This proposal would allow for a prompt response to cases where exporters in anticipation of a ruling on dumping and injury accelerate their imports in advance of the finding. The Sub-Committees are advised that this proposal would be inconsistent with Article 10.6 of the WTO Anti-dumping Agreement that effectively requires a final determination prior to taking any actions on "massive dumped imports."

Additionally, it was noted that there are presently certain limits on the data Revenue Canada can collect from respondents. These limits both prevent Revenue Canada from making an accurate assessment and make it difficult for Canadian industries to assist the Department in assessing the data of respondents.

To rectify this problem, two sub-proposals were put forth. First, it was submitted that Revenue Canada be given the power to collect data from all the domestic plants in which a respondent or its affiliates produce the goods subject to an investigation, not just the plant from which the goods are shipped to Canada. Revenue Canada could then be required to create a company wide normal value for each product. Second, Revenue Canada should be given the authority to gather data with respect to all the exporters' domestic sales of the "subject goods" not just those identified by the exporter as "comparable" to its sales in Canada.

Revenue Canada has indicated it already has sufficient statutory authority to determine normal value. However, if the Department were to take all the action proposed above in every case, it could increase non-compliance on the part of exporters and have the perverse result of reducing the data available in establishing anti-dumping duties.

Confidential Information

The CITT regularly affords counsel to parties engaged in anti-dumping and countervailing duty actions access to the confidential information acquired during these proceedings. However, the policy of the Deputy Minister of National Revenue has been to provide counsel with access to confidential information only in cases where the Deputy Minister is of the opinion that non-confidential summaries are not adequate to provide parties with a reasonable understanding of the substance of the information.

The Canadian Steel Producers Association submitted that SIMA should be amended to provide counsel increased access to confidential information in anti-dumping/countervailing duty investigations conducted by Revenue Canada. There are two principal arguments in favour of greater disclosure. First, it would allow interested parties to make rebuttal submissions thus improving the quality and reliability of evidence. Second, it would result in greater procedural fairness and lead to greater consistency with U.S. policies that are applied to Canadian producers exporting to that country.

However, a number of points were offered against any such proposal. It was contended that broader exposure to confidential information would result in parties becoming less forthcoming and would both lengthen the investigation process and render it more adversarial, thus substantially increasing the costs. Also, current SIMA timeframes might need to be extended to accommodate the consideration of rebuttal submissions and SIMA would have to be amended to provide for penalties to discipline the unauthorized disclosure of confidential information by counsel.

The Sub-Committees recognize that Revenue Canada has established a reasonable practice for handling confidential information. However, the large majority of Canadian exports go to the United States, and in that country the U.S. practice of affording access to confidential information often

leads to an increase in the information burden on Canadian exporters who are subject to U.S. investigations. In the interest of level playing field, **the Sub-Committees recommend that SIMA should be amended to provide counsel increased access to confidential information in anti-dumping/countervailing duty investigations conducted by Revenue Canada. (4)** The Sub-Committees note that this recommendation promotes overall balance in this report.

Any amendment to SIMA, implementing this recommendation will require the introduction of penalty provisions in SIMA for the unauthorized released by counsel of confidential information.

A related issue is access by experts to confidential information. Under Subsection 45(3) of the *Canadian International Trade Tribunal Act*, the CITT may only grant disclosure of confidential information to counsel and such counsel may not, without consent, disclose confidential information to any third party.[10] Counsel often wish to retain experts to give testimony before the CITT. However, in order to gain access to the confidential information on the record, such experts have to designate themselves as "counsel" to satisfy Section 45(3) of the CITT Act. However, common law normally precludes an individual acting as counsel from appearing as a witness in the same proceeding; therefore, parties' attempts to have fully informed experts appearing as witnesses on their behalf have been frustrated. **The Sub-Committees recommend that appropriate changes be made to Canadian trade legislation to permit access by experts to confidential information in SIMA proceedings before the CITT. (5)**

10 *Canadian International Trade Tribunal Act*, R.S.C., 1985, ch. C-18.3.

III. Final Determinations on Dumping/Subsidy and Injury

(I) The Present System

Once the preliminary determination is made, the SIMA process becomes bifurcated, with Revenue Canada making a final determination regarding the existence of dumping/subsidizing and the CITT determining the existence of injury.

Except where the investigation is suspended due to the acceptance of an undertaking, the legislation requires that Revenue Canada, within a further 90 days, make a final decision regarding the dumping or subsidizing.

In most investigations, some verified information is available at the preliminary determination. The investigation for the final decision consists of visiting additional firms not yet visited during the first 90-day period, verifying new information, revisiting exporters for clarification of details and visiting importers if necessary. The purpose of the final investigation is to obtain precise normal values or amounts of subsidy for use in the Deputy Minister's final determination or, alternatively, for the termination of the investigation. Where sufficient data has been collected, normal values or the amounts of subsidy are calculated on the basis of this data. Where sufficient information is not available, the calculation should be made on the basis of facts available.

If during the final investigation it is determined that the information or evidence shows that there is no dumping or subsidizing, that the margin of dumping or the amount of subsidy is insignificant, or that the volume of dumped or subsidized goods is negligible, then the Deputy Minister will terminate the investigation and all parties are notified in writing.

Conversely, if the investigation is not terminated, a final determination will be made. In the final determination of dumping or subsidizing, the precise margin of dumping or amount of subsidy is specified for each exporter and all parties are notified in writing. The final results are provided to the Tribunal for consideration in its inquiry into the matter of injury caused by the dumped or subsidized goods.

As in the case of the preliminary determination, Revenue Canada officials provide interested parties with an opportunity for a disclosure meeting, at their request, to fully explain how the normal values and export prices or amounts of subsidy were finally calculated. The result of Revenue Canada's consideration of their representations following the preliminary determination is also reviewed.

The final determination on dumping or subsidizing, or the termination of the investigation, represents the conclusion of the investigation by Revenue Canada under the Act. Under certain conditions, parties may appeal the decision of the Deputy Minister to make a final determination or to terminate an investigation to the Federal Court of Canada, or in the case of goods from a NAFTA country, parties may request a Binational Panel to review the decision under the terms of NAFTA.

While Revenue Canada is arriving at its final determination regarding dumping/subsidizing, the CITT initiates its inquiry regarding the existence of injury. Within 120 days of receiving notice of a preliminary determination, the Tribunal must complete this inquiry and issue a decision or "finding" as to whether the dumping or subsidizing of the goods has caused injury or retardation or is threatening to cause injury to the production in Canada of like goods. Alternatively, the Tribunal may find that the dumping or subsidization would have caused injury or retardation except for the fact that provisional duty was imposed in respect of the goods.

The Tribunal's finding on the question of injury may be one of three possibilities. First, the Tribunal may make a finding of no injury. Such a finding ends all proceedings in the investigation. In such a case, Revenue Canada refunds to the importer all provisional duties collected and returns any security that was posted.

Second, the Tribunal may conclude that injury has occurred, and impose anti-dumping or countervailing duty payable on all dumped or subsidized goods imported during the provisional period and on all shipments released after the date of the Tribunal's finding, until such a date that the finding is rescinded. Furthermore, if the Tribunal may also find that massive importations of dumped or subsidized imports have caused injury, in which case retroactive duty may be assessed on goods that were imported in the period starting on the day the investigation was initiated and ending in the day of the preliminary determination.

Third, the Tribunal may make a finding of threat of injury. In such a case, no anti-dumping or countervailing duty is payable on goods released before the date of the Tribunal's finding. Any provisional duty paid on importations prior to this date is returned to the importer with interest. However, duty is payable on all dumped or subsidized imports released after the date of the finding, unless covered by a valid undertaking.

Tribunal findings remain in place for five years unless they are reviewed by the Tribunal and a new order or finding is made to continue the finding for a longer period of time or to rescind it sooner.

(II) Summary of Proposals and Recommendations

1. Material injury. The Canadian Steel Producers Association and the Canadian Pasta Manufacturers Association proposed that a more explicit definition of "material injury" should be incorporated in SIMA, possibly along the lines of the U.S. definition, which is "injury which

is not immaterial, inconsequential or unimportant". The Canadian Pasta Manufacturers Association attributed in part the difference in legal definitions as the explanation of why dumped pasta was found in a recent case to cause material injury in the United States, while in a similar case in Canada there was a negative finding on injury.

The Sub-Committees decline to make a recommendation on this matter. First, SIMA contains a new, post-WTO definition of injury, "material injury to a domestic industry", which is further elaborated in SIMA Regulations 37.1 which prescribes factors for determining injury. Some time should be allowed for the CITT to become familiar with this changed regime. Adopting the U.S. definition at this point could create uncertainty in the interpretation of existing law.

Second, it is not clear *prima facie* that the U.S. definition would provide any additional guidance over the Canadian definition. At base, the matter is one of judgment, and over time the frequency of positive injury findings by the CITT and the U.S. International Trade Commission are comparable.

Third, the pasta case may not be a sufficient basis for comparing interpretations of material injury in Canadian and U.S. trade remedy actions. The case turned more on causality than on material injury, it involved some product differences, and the time periods were different. Such differences could give rise to different interpretations within the same jurisdiction, as well as across jurisdictions.

2. Improve CITT operating procedures. Several parties raised concerns about injury proceedings before the CITT. It was proposed that the CITT should shorten and streamline its hearing process, that the CITT should require the filing of written briefs, and that it should exclude from hearings those parties that have not filed briefs.

As indicated by the CITT Chairman in testimony before the Sub-Committees, the Tribunal completed a review of its procedures which involved consultation with stakeholders. The review recommends ways to streamline the process and place less emphasis on lengthy hearings. The Sub-Committees suggest to the government to take note of the tribunal's report and to give it the consideration that it merits.

3. Evidence of dumping in other countries. The Canadian Steel Producers Association proposed that: "When the CITT is assessing the threat of future injury to a Canadian industry, require it to consider as evidence of likely future dumping the fact that similar products have been dumped in other countries, as evidenced by anti-dumping findings in other WTO member markets."[11]

The Sub-Committees note that in the assessment of threat of injury, SIMA Regulations 37.1 already authorizes the CITT to take account of "any other factors that are relevant in the circumstances", which clearly could lead to a consideration of dumping in other countries. However,

---

11 Brief of Canadian Steel Producers Association of October 30, 1996.

reference to this issue specifically provides valuable guidance to the CITT, and therefore **the Sub-Committees recommend the inclusion in SIMA Regulations the fact of dumping in third country markets as evidence of threat of future injury. (6)**

4. Consultative mechanism with United States. The Canadian Pasta Manufacturers Association proposed that Revenue Canada and the CITT should establish a formal mechanism to consult with the U.S. Department of Commerce and the International Trade Commission if similar trade remedy actions are under consideration in the two countries.

The Sub-Committees are advised that Chapter 19 of NAFTA provides for consultation on anti-dumping and countervailing duty matters, and that informal and occasional contacts are already established between Revenue Canada and the Department of Commerce. However, it would be inappropriate for the CITT as a quasi-judicial body to engage in similar consultations in connection with an ongoing case.

5. Dumping investigations of distributors/service centres. The Automotive Parts Manufacturers Association and Canadian Importers Association propose that the Revenue Canada should allow distributors and service centres to use their arms' length purchase price, not their suppliers' cost of production, as the basis for the determination of dumping. The alleged reason for this proposal is that it is often difficult for small foreign exporters to comply with Revenue Canada's requests for information, especially if the exporter is a distributor or wholesaler that does not have access to the original manufacturers' production costs. It is further alleged that the present policy of Revenue Canada is to deem the response incomplete and apply punitive dumping duty rates. This proposal, claim both Associations, would reduce the imposition of unfair duties.

The Sub-Committees note it would be difficult to address this issue in terms of statutory change, since it would mean establishing in effect different categories of exporters (e.g. original manufacturers, distributors). There is flexibility in law and administrative practice in the context of "best facts available" procedures to distinguish between exporters who have difficulty complying with Revenue Canada's requests for information, and those that intentionally avoid responding to those requests.

6. Undertakings. The Canadian Importers Association and the Retail Council of Canada proposed that the negotiation of undertakings by Revenue Canada should allow for representations from interested parties, and that undertakings should be reviewed within a specific time period and be in place no longer than five years. At present, section 53(1) of SIMA requires a review of any undertaking at least every five years to determine if it should be renewed.

The Sub-Committees note that Revenue Canada's administrative practice and not SIMA govern the negotiation of undertakings. Recognizing the potential of undertakings to cause disruption in domestic markets, **the Sub-Committees recommend that Revenue Canada make allowance in regulations to accommodate representations from interested parties when undertakings are being considered. (7)**

Furthermore, **the Sub-Committees recommend that section 53(2) of SIMA be amended to allow the Deputy Minister of National Revenue to review and terminate undertakings before five years. (8)**

7. Cumulation. The Canadian Steel Producers Association proposes that SIMA should require the CITT to assess the impact of dumped or subsidized goods cumulatively, as it is the cumulative impact which in fact causes injury.

Currently cumulation is discretionary in injury inquiries under section 42(3) of SIMA, although it is mandatory in U.S. law. The Sub-Committees note that the practice of the CITT is to cumulate in virtually all cases.

The Sub-Committees recommend that SIMA be amended to make cumulation mandatory in the CITT's procedures for determining injury. (9)

8. Sales of similar goods. The Canadian Importers Association proposes that—in the determination of normal value — SIMA should be amended to provide for the progression to sales of similar goods (those with minor technical differences) in the case of single home market sales of like goods, instead of the progression to the constructed cost approach as is now the practice.

There are two issues here. First, in determining normal value, section 16(2) of SIMA does not permit the use of sales of like goods to a single customer. The rationale is that such sales could be unreliable, uneconomic or otherwise made principally to establish a normal value. By comparison, U.S. law is more lenient than Canada's. The Sub-Committees are disinclined to reduce the protection to Canadian producers provided by section 16(2) of SIMA.

Second, on the matter of similar goods, there is already some flexibility built into the definition of like goods in section 2(1) of SIMA, in that if there are no "identical goods" Revenue Canada can look at goods that "closely resemble" the goods in question. To move beyond the "like goods" definition could raise problems of consistency with the WTO Anti-dumping Agreement, since Article 2.2 of that Agreement speaks only of "like products", and in the absence of such products directs the investigating authority to use third-country or constructed cost approach.

9. Domestic market. The Canadian Steel Producers Association proposes that the CITT should be required, in defining the domestic market for the purposes of injury assessment, to exclude shipments among affiliated companies. Lack of such a requirement has allegedly led to uncertainty and inconsistency. The open domestic market is where imports compete directly with Canadian products.

The Sub-Committees note that the CITT collects information on all sales in the domestic market (captive and merchant) respecting its production analysis contained in its staff report. However, with respect to its analysis on injury and causation, it focuses on sales in the merchant market. There appears to be no issue outstanding with the Canadian Steel Producers Association on this matter.

IV. Enforcement

(I) The Present System

Following the preliminary determination, SIMA provides for the imposition of provisional anti-dumping and countervailing duties. These duties are based on the estimated margin of dumping or the estimated amount of subsidy determined in respect of each exporter of the subject goods to Canada. Goods imported into Canada from the date of the preliminary determination to the date of the injury finding by the CITT (i.e. the provisional period) are subject to these duties.

The final determination is a refinement of the margins of dumping or amounts of subsidy which were estimated at the time of the preliminary determination. However, the values determined at the final determination have no impact on the amount of duties which were assessed during the provisional period since provisional duties remain based on the amounts determined at the preliminary determination.

The CITT must render its final injury finding within 120 days after it receives notice of the Deputy Minister's preliminary determination of dumping or subsidization. If the CITT finds no injury or only a threat of injury, all provisional duties are refunded with interest and any posted security is returned to the importers. If the CITT finds that the dumping or subsidization has caused injury, the provisional duties are made "definitive" through a "section 55" exercise which establishes the actual margins of dumping or amount of subsidy owing on the goods.

Provisional duties paid in excess of the actual amounts owing are refunded. Where the provisional duties are less than the actual margin of dumping or amount of subsidy, no additional duties are collected (in conformity with the international WTO rules). Importations of goods made subsequent to the CITT finding are subject to definitive anti-dumping or countervailing duties based on the margin of dumping or the amount of subsidy established at the final determination.

Revenue Canada must decide who will be treated as the importer for the purposes of duty assessment. The objective is to ensure that the person in Canada who benefits most from the dumping is not insulated from any duty liability by dealing through an intermediary which clears the goods through Customs, such as a party related to the exporter.

According to the definition in SIMA, the importer is " . . . the person who is in reality the importer of the goods". Also, there are references throughout SIMA to the importer in Canada. As a general rule, a non-resident importer, customs broker or agent representing the exporter or importer is not considered to be the importer in Canada. Even though the importer of record may be a resident

in Canada, it may or may not be the importer in reality under SIMA. In circumstances where the designation of the importer for SIMA purposes is not evident, Revenue Canada will consider the importer to be the purchaser in Canada for whom the goods are ultimately destined.

Once the appropriate values and parties are identified, duty is assessed. Under Canada's system of duty assessment, which is based on the issuance of prospective normal values, exporters have the option of increasing the sale price of the subject goods exported to Canada to an amount equal to the normal value of the goods. This will eliminate any margin of dumping and the importer will face no liability for anti-dumping duties at the time of importation.

The use of a prospective method of duty assessment eliminates dumping and Canadian producers are effectively protected from injury caused by dumped goods. This provides predictability to foreign exporters and Canadian importers who are aware of duty liability. Generally, the design of the Canadian prospective duty assessment system has evolved to reflect the needs of various components of the domestic economy and the government.

In subsidy cases, countervailing duties are applied to offset the amount of the foreign subsidization. Such duties are normally levied on a specific per unit amount. Unlike anti-dumping duties where the amount of duty is directly based on the difference between the selling of the goods and the normal value, countervailing duties are a fixed amount. A price adjustment in subsidy cases will, therefore, have no impact on the amount of countervailing duties which will be collected.

Revenue Canada maintains an enforcement program in respect of SIMA to ensure that SIMA duties are properly collected on subject goods. Like other customs programs, most SIMA enforcement activities are carried out primarily on a post importation basis and involve the review of customs entries that may involve imported goods subject to a SIMA finding. The large volume of importations made into Canada and the need to expedite the import process, makes it impracticable to review every transaction at the time of importation. The objective of this enforcement process is to ascertain if the imported goods are subject to a finding and establishing the amount of anti-dumping and countervailing duties which are owing, or to confirm that the amount of duty which may have been paid earlier by the importer is correct.

(II) Summary of Proposals and Recommendations

1. Prospective/Retrospective duty assessment. The Canadian Steel Producers Association proposes a retrospective duty assessment system to be used where there would likely be significant fluctuations in prices or costs. Such a system would see the use of cash deposits equal to the estimated margin of dumping. Final duty liability would be determined on review with excess duties being returned and, where required, additional duties being demanded. This system is employed by the United States.

Canada uses a prospective approach, which establishes margins of dumping or amounts of subsidy which apply to future importations thereby allowing authorities to determine the amount of duty liability at the time of importation. Under this system, normal values (i.e. non-dumped prices) are established prior to the importation of goods which are subject to an anti-dumping order. If the subject goods are priced up to these normal values at the time of importation, no anti-dumping duties are levied. However, if the export price is below the normal value, anti-dumping duties equal to the difference between the normal value and the export price must be paid.

Both systems are generally comparable in terms of their effectiveness in eliminating injury due to dumping or subsidization. Where they differ is that the Canadian system is more transparent and predictable, and eliminates injury while at the same time ensuring that Canadian importers do not face unnecessary cost or impediments to the importation of goods at non-dumped prices. By contrast, the retrospective system creates uncertainty for importers as they will not know their ultimate duty liability on each shipment until months or even years after the date of importation.

The Sub-Committees view as unwise any change from the current prospective method of duty assessment. As is explained later in this report, Canada is more dependent on imports than is the United States, and it has need of a duty enforcement system that accomplishes the task of removing injurious dumped or subsidized imports with as little disruption to trade as possible. **The Sub-Committees recommend no change from the prospective method of duty assessment. (10)**

2. Identity of importer for duty liability. The Retail Council of Canada proposed that the importer of record and not just the "true importer" be liable for anti-dumping duties. The Council considers the determination of importers' customers as the "true importers" to be a severe penalty for retailers who enter into purchase agreements with vendors who act as importers. When title of the goods is passed to the customer after importation, the Council believes that the customer in Canada should not be liable for costs related to importing the goods when it did not hold legal title to the goods.

Section 2(1) of SIMA defines the importer as " . . . the person who is in reality the importer of the goods". Special provisions in SIMA permit someone other that the person who has accounted for the goods to be declared the importer for purposes of assessing SIMA duties. The objective of these provisions is to ensure that the person in Canada who benefits most from the dumping is not insulated from any duty liability be dealing through an intermediary which clears the goods through Customs, such as a party related to the exporter.

In the majority of importations, the importer for SIMA purposes is the same person as the importer of record. However, in circumstances where the designation of the importer for SIMA purposes is not so evident, Revenue Canada will consider the "importer in Canada" to be the purchaser in Canada to whom the goods are ultimately destined, e.g. the entity which has negotiated terms and conditions of sale or the purchase price directly with the exporter.

The proposal by the Retail Council of Canada could reduce the effectiveness of SIMA if exporters are prepared to absorb the duties and not increase prices to purchasers in Canada. The Sub-Committees consider the capacity of SIMA to protect Canadian producers from injurious dumped or subsidized goods as a primary concern, and it is disinclined to act on the proposal of the Retail Council.

3. Annual reviews. The Canadian Steel Producers Association has proposed that annual reinvestigations should be conducted at the request of either the domestic complainant or the respondent.

The Sub-Committees view this issue as an administrative and not a statutory question. Reviews will be initated when a cause can be demonstrated; e.g. a significant change in costing or pricing in the exporter's home market. Revenue Canada generally has not refused requests for reviews. The issue is also one of resources. If the decision to undertake reviews remains with Revenue Canada, it can conduct them when personnel are available and not needed for investigations. In an era of government cutbacks, this is a reasonable position.

4. Self-assessment. In the enforcement of SIMA findings, Revenue Canada encourages importers whose goods are subject to SIMA measures to voluntarily self-assess SIMA duties at the same time that they account for other customs duties and taxes. However, the current level of voluntary compliance is low in cases where SIMA duties are applicable. Much of this problem results from the fact that SIMA places the onus on Revenue Canada rather than the importer to identify importations subjects to SIMA duties and to assess any SIMA duties which may be payable.

In order to achieve a greater level of self-assessment, which is necessary to ensure that SIMA findings have the intended remedial impact on import pricing, Revenue Canada has proposed that consideration be given to amending SIMA to provide that importers be required to clearly identify on import documents that their goods are subject to a SIMA finding and indicate the amount of SIMA duties that are payable. The Act should also be amended to require that the payment of SIMA duties occur at the same time as other customs duties and interest should be charged for late payments. Finally, penalties should apply where importers do not account for SIMA duties within the required time frames without good reason.

The Sub–Committees support the objective that SIMA findings should have the intended remedial impact on import pricing, and note that this proposal should be considered by the Minister of Finance.

5. Circumvention. The Sub-Committees received some submissions regarding circumvention. These submissions dealt specifically with (i) misdescription of goods, and (ii) product changes that cause goods subject to an anti-dumping or countervailing duty to fall outside the product definition. The former is a matter of fraud, and there is presently enough authority in the

Customs Act to discipline this behaviour when it is detected. The latter would require that a new anti-dumping or countervailing duty investigation be undertaken. In either case, it does not appear that statutory changes are needed.

The Sub–Committees ask the Minister of Finance to take these matters under advisement and to consider whether further action regarding fraud or product definition need to be taken.

V. Reviews

(I) The Present System

A positive injury finding by the Tribunal under section 43 of SIMA is subject to subsequent review by the Tribunal, either on its own initiative, or pursuant to a request for review. Following a review of a section 43 finding, the Tribunal has the power to make an order rescinding the finding or continuing it with or without amendment.

Consistent with the WTO, the Tribunal can conduct two types of review under section 76 of SIMA:

1. interim reviews (based on changed circumstances), which can occur anytime between a positive injury finding under section 43 of SIMA and the issuance of a "Notice of Expiration";

2. expiry (or sunset) reviews, which can occur upon a request filed in response to the Tribunal's Notice of Expiration.

Section 76 of SIMA does not expressly differentiate between interim and expiry reviews, nor does it provide any guidance as to the grounds for the initiation of interim and expiry reviews.

In conducting interim reviews, the Tribunal may consider whether a key circumstance has changed so fundamentally as to render the original finding no longer valid. With respect to expiry reviews, the Tribunal assesses the likelihood that injurious dumping or subsidy will continue if the finding is rescinded.

(II) Summary of Proposals and Recommendations

During this review of SIMA, the Sub-Committees became aware of a number of issues related to the implementation of reviews. In part, these issues have come into sharper focus in reference to the requirements of Article 11 ("Duration and Review of Anti-dumping Duties and Price Undertakings") of the WTO Anti-dumping Agreement. These issues include:

i. the need for SIMA to distinguish expressly between interim and expiry reviews, consistent with the WTO Anti-dumping Agreement;

ii. the provision of legislative and regulatory guidance for the initiation of interim and expiry reviews, and possibly the inclusion of an illustrative list of grounds for initiation;

iii. the provision of legislative and regulatory guidance respecting the determination of whether or not to continue a finding or order;

iv. the authorization to conduct reviews on a specific aspect of a finding or order;

v. the authorization to make a review determination retroactive when rescinding a finding or order;

vi. the consideration of cumulation in reviews. The Canadian Steel Producers Association has proposed that the CITT should have legislative instruction to apply cumulation consistently;

vii. the application of bifurcation in the administration of reviews, consistent with recommendations elsewhere in this report.

The Sub-Committees recommend that the Minister of Finance reform SIMA provisions for the conduct of interim and expiry reviews, in light of the comments made above, and in this context, to bifurcate the administrative responsibilities for the conduct of such reviews. (11)

The Sub-Committees further recommend that section 76 of SIMA be amended to require the CITT to assess the cumulative injurious effects of dumping/subsidizing in conducting interim and expiry reviews. (12)

VI. Public Interest, Lesser Duty and Short Supply

(I) The Present System

SIMA contains a general provision which allows the CITT to recommend the reduction or elimination of anti-dumping duties or countervailing duties if it is considered to be in the public interest. However, since its establishment in 1984, this provision has been used infrequently.

Section 45 of SIMA provides that, in the event of a finding of injury, "persons interested" may make representations to the CITT on the question of whether the imposition of duties is in the public interest. If the CITT is of the opinion that there is a public interest concern, it will recommend a reduction or elimination of duties in a report to the Minister of Finance. The Minister of Finance may, on the basis of such a report, recommend to the Governor in Council that duties be reduced or eliminated.

SIMA in its current form does not define public interest. It also provides little direction as to how the Tribunal should interpret what public interest is. However, a "person interested" is defined in SIMA regulations (s.41) to include: producers, purchasers, sellers, exporters and importers of the subject goods or like goods to the subject goods, officials of the federal Competition Bureau, consumers and consumer associations.

In conducting a public interest investigation, the CITT uses a two-step approach. First, the Tribunal receives submissions from parties on the issue of whether to initiate an investigation or not. Second, where the Tribunal initiates a public interest investigation, it gathers relevant information and holds a public hearing at which witnesses, including those called by the Tribunal, are examined. As a court of record, the Tribunal also has the power to subpoena witnesses and require the production of documents.

There are two concepts closely related to the matter of public interest. First is the lesser-duty approach. This concept is more specific than public interest and linked to the concept of injury. The recent WTO Anti-dumping Agreement (Article 9.1) states that "it is desirable that the imposition of the duty be less than the margin [of dumping], if such lesser duty would be adequate to remove injury to the domestic industry". However, SIMA does not contain a lesser duty provision.

Second is the issue of different treatment under trade legislation for goods in short supply. Presently there is no effective mechanism in SIMA to allow for the exemption of goods from anti-dumping/countervailing duty orders in domestic short supply situations. While section 14 of SIMA allows the Governor in Council to make regulations exempting any goods from the application of the Act, this provision was not designed to provide expeditious, time-limited relief in temporary short supply situations.

(II) Summary of Proposals and Recommendations

Public Interest

Of the many comments received on the issue of "public interest", none objected to the provision or thought that this section of the law should be removed. Most observed either that the current mechanism functions reasonably well, or that the legislation should be revised to strengthen the application of public interest. For example, the Canadian Pasta Manufacturers Association stated: "The Canadian system ensures that the public interest is taken into account";[12] while the Automotive Parts Manufacturers Association argued the opposite, noting that the public interest provision was not adequate to prevent some producers from abusing the market protection provided through anti-dumping actions.[13]

Some offered proposals for improvements. For example, it was suggested by the National Dairy Council of Canada and the Brewers Association of Canada, among others, that a list of criteria or factors should be adopted in order to better guide the CITT as to the meaning of public interest and to indicate the intended scope of such investigations. Such criteria would need to address an inclusive list of issues such as the impact on competition in Canada, the price effects on products in question, employment effects, or the economic gains and losses for industry and the economy in general.

In oral testimony, former CITT Vice-Chairman, Mrs. K.E. MacMillan observed: "The statute provides no guidance as to what the public interest is. The criteria for public interest should be articulated more clearly, in a broader sense."

Proposals were advanced to strengthen the interaction with the Competition Bureau to ensure that trade remedy actions do not run at cross purposes with competition policy objectives. The role of the Competition Bureau would be to provide advice on the impact of specific trade remedy actions on competition in the domestic market. Central to such an assessment would be the impact on domestic competition and on the competitiveness of downstream industries.

This issue of downstream interests was remarked upon in a number of the submissions. There were diverging opinions on this matter. The Alliance of Manufacturers and Exporters Canada argued that downstream industries should be more fully made aware of the potential impact on their interest of CITT decisions in order to facilitate more complete participation by all affected parties in the process. Others suggested that removal of injury to the domestic industry is paramount and protection to downstream interests should not override that purpose.

---

[12] Brief of Canadian Pasta Manufacturers Association of October 30, 1996.

[13] Brief of the Automotive Parts Manufacturers Association of October 30, 1996, Appendix A.

Taking these various views into account, the Sub-Committees are persuaded that public interest plays an essential role in Canadian trade remedy legislation and that the law needs to be clarified for it to work properly. Therefore, **the Sub-Committees recommend that a non-exclusive list of factors be included in section 45 of SIMA that would guide the CITT respecting whether and how to conduct a public interest inquiry. (13)**

Public interest is a term that should receive as clear an operational definition as do the terms dumping or subsidy, which are defined in law, or the term injury, which is largely defined in regulations. Factors that might form a test for public interest could include: significant damage to downstream users; problem of access to inputs due to imposition of the full duty; restriction of competition in domestic market; significant impact on choice or availability of products to consumers; elimination of competition in the marketplace; and so forth.

It is understood that any criteria or factors expressed in legislative language would take precedence over previous CITT practice, such as the "exceptional basis" test applied in the Grain Corn case.[14]

In applying section 45 of SIMA, the CITT faces two decisions: first, a threshold decision on whether to initiate a public interest investigation; and second, the determination of the outcome of any investigation initiated. The threshold decision should be based—as is the case, by analogy, with a decision to initiate an anti-dumping or countervailing duty investigation—on whether there is sufficient evidence of adverse impact on public interest. In keeping with the formal, quasi-judicial nature of CITT proceedings, **the Sub-Committees recommend that the CITT's decision, that an anti-dumping or countervailing duty might not be in the public interest, should be a formal decision reviewable by a Federal Court. The level of any duty reduction should continue as at present in section 45 of SIMA to be a report to the Minister of Finance. (14)**

Lesser Duty

The issue of lesser duty was reflected in testimony before the Sub-Committees. The Canadian Importers Association stated: "In injury situations, the level of dumping duty (normal value) should be only that which is sufficient to remove the injury."[15]

A fuller statement was provided by the Alliance of Manufacturers and Exporters Canada: " . . . the Tribunal should be authorized in appropriate circumstances, under section 45, to calculate a lesser duty in order to achieve a margin of dumping sufficient only to bring the low foreign price to the level of the Canadian price (presuming that price covers costs and results in a profit).

---

14 Canadian Import Tribunal, Report on the Public Interest: Grain Corn (1987).

15 Brief of the Canadian Importers Association of October 23, 1996.

Accordingly, margins of dumping often found by Revenue Canada in percentages such as 50%, 100% or even more, could be replaced by much lower numbers reflecting more closely the difference between the objectionable foreign price and the Canadian price level. However, until other WTO countries adopt such a rule, Canada cannot be in a position of being the only country, or one of few countries adopting this practice."[16]

In fact, other countries do apply the lesser duty rule. This includes Australia, New Zealand, and the largest trader in the WTO, the European Union. Unfortunately, Canada's closest competitor, the United States, does not. This raises the question to what extent Canada should model its trade remedy legislation after the United States, as some proposed in testimony before the Sub-Committees.

The Sub-Committees find this question has been addressed compellingly by the Competition Bureau, as follows:

> The Canadian approach to remedies should reflect the differences between Canadian and U.S. economic realities, viz: (i) trade accounts for a much greater percentage of our national income and, therefore, disruptions of trade flows are likely to be far more costly to Canadian consumers and industrial users than in the U.S.; (ii) Canada has more concentrated production structures and as a consequence, duties are more likely to permit protected producers to exercise market power and raise prices and profits beyond costs with implications for both efficiency and fairness; and, (iii) the high foreign ownership of many Canadian industries implies that the benefits of protectionist actions often accrue to foreign shareholders while the costs are incurred by Canadian consumers and participants in user industries.[17]

Recent research by the Organization for Economic Co–Operation and Development (OECD) supports the Competition Bureau. In a recent study on globalization, the OECD notes that: "International sourcing of parts and materials is a major feature of global production systems . . . the ratio of imported to domestic sourcing in the latest period reached 50% for Canada and 35-40% for France, Germany and the United Kingdom. By comparison, the ratio was 13% for the U.S. and 7% for Japan."[18]

The conclusion is that Canada has a very different economy from that of the United States, and consequently may need different economic policies. The United States can more easily afford the downstream costs of anti-dumping and countervailing duty actions because it is less dependent than Canada on international sourcing.

Therefore, **the Sub-Committees recommend that the lesser duty concept as provided in Article 9.1 of the WTO Anti-dumping Agreement be incorporated in section 45 of SIMA provisions for public interest. (15)**

---

16 Brief of the Alliance of Manufacturers and Exporters Canada of November 20, 1996.

17 Brief of Competition Bureau, Industry Canada, of November 12, 1996.

18 Globalization of Industrial Activities: Background Report, COM/DSTI/IND/TD(93)109/REV1, January 28, 1994, p. 16.

Short Supply

Both the Automotive Parts Manufacturers Association and the Alliance of Manufacturers and Exporters Canada supported the enactment in SIMA of an exemption for short supply situations. They argued that by subjecting materials that are in short supply to an investigation and duties unduly hampers those Canadian industries that rely on these materials, causing unnecessary hardship, while providing no real benefit to the local producers.

It was proposed that a system of temporary remission or suspension of anti-dumping/countervailing duties by Revenue Canada could be ordered covering only the period of the shortage. Any decision-making procedure would need to be expedited with strict limitations on timeframes and documentation. The statutory language would need to ensure that controls are kept in place to keep the "period of shortage" open for only specific quantities of specific products for as limited a time as possible.

It should be noted that the equivalent to a short supply exemption exists in European Union, and that a short supply provision has been considered but not implemented by the U.S. Congress.

Short supply is a relatively recent concept on which further analysis is needed. **The Sub-Committees recommend that the Minister of Finance consider amending SIMA to allow for the temporary exemption of goods from anti-dumping/countervailing duty orders under conditions of domestic short supply. (16)**

A short supply amendment to SIMA could be implemented by affording domestic complainants initial recourse to the Deputy Minister of National Revenue, who would have new statutory authority to determine whether a short supply complaint was well founded, and if so, recommend to the Minister of Finance that the collection of anti-dumping/countervailing duties be temporarily suspended. Factors that should be given consideration are whether such a determination should have retroactive effect, and whether the determination would only be applicable to specific importations by the parties who requested the ruling or be generally applicable for all importers.

Request for Government Response

The Sub-Committees request that the Government provide a comprehensive response to this Report in accordance with Standing Order 109.

A copy of the relevant Minutes of Proceedings (Issue No. 1) of the Sub-committee on the Review of the *Special Import Measures Act* of the Standing Committee on Finance, which includes this Report, and (Issue No. 2) of the Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade, which includes this Report, are tabled.

Respectfully submitted,

Ron Duhamel

Hon. Michel Dupuy

Co-Chairs,

Sub-Committee
on the Review of SIMA

Sub-Committee
on Trade Disputes

A copy of the relevant Minutes of Proceedings (Issue No. 9) of the Standing Committee on Finance, which includes this Report, and (Issue No. 8) of the Standing Committee on Foreign Affairs and International Trade, which includes this Report, are tabled.

Respectfully submitted,

Bill Graham

Chair

Standing Committee on Foreign Affairs an International Trade

Jim Peterson

Chair

Standing Committee on Finance

Appendix A
List of witnesses

Associations and Individuals	Issue/ Meeting No.		Date
	SIMA	STDF	
"École nationale d'administration publique (Montreal)"	1	2	September 18, 1996
Emmanuel Nyahoho			
University of Toronto — Faculty of Law	1	2	September 18, 1996
Robert Howse			
Queen's University — Department of Economics	1	2	September 18, 1996
Klaus Stegemann			
Grey, Clark, Shih and Associated Limited	1	2	September 18, 1996
Peter Clark			
Canadian Federation of Agriculture	1	2	October 23, 1996
Jack Wilkinson			
Don Knoerr			
Canadian Carpet Institute	1	2	October 23, 1996
Michael Kronick			
Frank Guthier			
Canadian Importers Association	1	2	October 23, 1996
Donald R. McArthur			
Gottlieb & Pearson Law Firm	1	2	October 23, 1996
Richard S. Gottlieb			
Canadian Steel Producers Association (Ottawa)	1	2	October 30, 1996
Jean Van Loon			
John Le Boutillier			
Don Belch			
Automotive Parts Manufacturers Association	1	2	October 30, 1996
Ken MacDonald			
Bob Taylor			
Canadian Sugar Institute (Toronto)	1	2	October 30, 1996
Sandra Marsden			

Associations and Individuals	Issue/ Meeting No.		Date
	SIMA	STDF	
Canadian Pasta Manufacturers Association (Ottawa)	1	2	October 30, 1996
Don Jarvis			
Retail Council of Canada (Toronto)	1	2	October 30, 1996
Diane Brisebois			
Darrel Pearson			
Cassels Brock & Blackwell Law Firm	1	2	November 18, 1996
Lawrence L. Herman, Associate Counsel			
Flavell, Kubrick and Lalonde Law Firm	1	2	November 18, 1996
Michael Flavell, Q.C., Senior Partner			
International Trade Policy Consultants Inc.	1	2	November 18, 1996
K.E. MacMillan			
Osler, Hoskin & Harcourt Law Firm	1	2	November 18, 1996
Ronald Cheng			
Horticultural Council (Ottawa)	1	2	November 20, 1996
Stephen Whitney			
John Kuhl			
Canadian Wine Institute	1	2	November 20, 1996
Roger Randolph			
Alliance of Manufacturers and Exporters Canada	1	2	November 20, 1996
John Bailie			
Michael Flavell, Q.C.			
Dennis Martin			
James D. Moore			
Westroc Industries Ltd.	1	2	November 20, 1996
Brent Thomson			
Robert Morrow			
Denis Gascon			
As an individual	1	2	November 25, 1996
Herb Grubel, M.P., for Capilano—Howe Sound			
United Steel Workers of America	1	2	November 25, 1996
Hugh MacKenzie			

Associations and Individuals	Issue/ Meeting No. SIMA	STDF	Date
British Columbia Fruit Growers Association (Vancouver)	1	2	November 25, 1996
Russel Husch			
British Columbia Vegetable Marketing Commission	1	2	November 25, 1996
Roger Hughes			
Canadian Bar Association — Sales, Commodities and Taxes	1	2	November 25, 1996
Riyaz Dattu			
Glenn Cranker			
McCarthy Tetrault Law Firm (Toronto)	1	2	November 25, 1996
Hon. Donald MacDonald			
Canadian International Trade Tribunal	1	2	November 27, 1996
Anthony Eyton			
Gerry Stobo			
Ron Eardman			
Revenue Canada — Trade Administration Branch, Anti-dumping and Countervailing Directorate	1	2	November 27, 1996
Brian Brimble			
R.A. Séguin			
Industry Canada — Competition Bureau	1	2	November 27, 1996
Robert Lancop			
Zulfi Sadeque			
Roy Hines			
Department of Finance	1	2	November 27, 1996
Terry Collins-Williams			
Department of Foreign Affairs and International Trade, Trade Remedies Division	1	2	November 27, 1996
John McNab			
Mike Robertson			
Steven Rhealt-Kihara			

Appendix B
Briefs

Alliance of Manufacturers and Exporters Canada

Associate Counsel, Cassels Brock & Blackwell

Automotive Parts Manufacturers Association

Brewers Association of Canada

British Columbia Fruit Growers Association (Vancouver)

British Columbia Vegetable Marketing Commission

British Steel Canada Inc.

Canadian Bar Association — Sales, Commodities and Taxes

Canadian Bicycle Manufacturers Association

Canadian Carpet Institute

Canadian Federation of Agriculture

Canadian Importers Association

Canadian Pasta Manufacturers Association

Canadian Steel Producers Association (Ottawa)

Canadian Steel Service Centre Institute

Canadian Sugar Beet Producer's Association Inc.

Canadian Sugar Institute

Canadian Wine Institute

Delegation of European Commission in Canada

Department of Finance

Gottlieb & Pearson Law Firm (Montreal)

Government of Alberta

Government of British Columbia

Government of Newfoundland and Labrador

Horticultural Council (Ottawa)

Industry Canada, Competition Bureau

McCarthy Tetrault Law Firm (Toronto)

National Dairy Council of Canada

Professor Klaus Stegemann — Queen's University

Public Interest Advocacy Centre

Retail Council of Canada

Revenue Canada, Trade Administration Branch, Anti-dumping and Countervailing Directorate

Robert C. Varah

Schuller International Inc.

Westroc Industries

Dissenting Opinion by the Bloc Québécois

Report on the *Special Import Measures Act*

December 1996

Foreword:

The Bloc Québécois participated enthusiastically in the proceedings of the Sub-committees of the Standing Committee on Foreign Affairs and International Trade and the Standing Committee on Finance that reviewed the *Special Import Measures Act*. We want to pay tribute to the excellence and relevance of the extensive testimony heard by the Sub-committees. The members of the Bloc Québécois were also impressed by the quality of the briefs submitted.

We therefore read the first draft of the report with great interest. After in-depth study of it, we came to the conclusion that there were a number of important elements that needed amending. Some of our amendments were incorporated into the revised report. For example, the Bloc Québécois succeeded in improving access to the investigation process for small and medium-sized producers. We managed to introduce improvements in the way the CITT operates, and we persuaded the government party that the recommendation on cumulation should call for it to be mandatory in the CITT's procedures for determining injury. A section on circumvention was included at our suggestion, and the section on reviews was strengthened.

Despite these significant changes, a number of the Bloc's recommendations were dismissed by the government party. Our dissenting opinion centres on these elements.

1 - Data Collection, page 15, first paragraph:

We agree with the proposal of the Canadian Steel Producers' Association that Revenue Canada disregard unsolicited submissions from parties other than the complainants prior to the initiation of an investigation. Such a measure would mean that Revenue Canada would take into consideration information from the complainant only, and that it would not be required to act on unsolicited comments. This measure seems reasonable to us, given that it would apply only to the period prior to the initiation of an investigation.

In the second paragraph, we cannot agree with the way the report deals with "massive dumping". It is true that Article 10.6 of the WTO Anti-dumping Agreement is open to interpretation, but from there to asserting, without the benefit of any in-depth legal opinions, that the whole concept of "massive dumping" is inconsistent with this Article, is a step that we are not prepared to take.

In our view, before renouncing all measures in this regard, the Canadian government should obtain legal opinions on the issue, which is important for those of our industries that have fallen victim to "massive dumping". Given favourable opinions, the government should go ahead and implement such a measure.

2 - Material injury, page 21, second paragraph

The Bloc Québécois supports the incorporation in SIMA of a definition of the term "material injury". Incorporating a definition of this term in SIMA, along with the factors proposed in the present Regulations, would clarify this important concept, for the benefit of all parties concerned.

3 - Prospective/retrospective duty assessment, page 26

On this point, the Bloc Québécois is of the opinion that Revenue Canada should continue to use the prospective method of duty assessment. However, in cases where there would likely be significant fluctuations in prices or costs, we would like Revenue Canada to be authorized to use the retrospective method of duty assessment. This method would be used exceptionally and only when considered necessary by Revenue Canada.

4 - Lesser duty, page 36, sixth paragraph

We consider that at present it would be premature to proceed with incorporating a provision on the lesser duty concept in SIMA. The government must stop adopting policies that weaken protection for Quebec and Canadian businesses when our main economic partners are not acting in a similar manner. We consider that the government party is behaving naïvely in this regard. We believe that the United States, which absorbs nearly 80% of our exports, must adopt such a measure itself before this provision is incorporated in SIMA.

5 - Short supply, page 37, fourth paragraph

The Bloc Québécois believes that the federal government should not consider amending SIMA so as to incorporate in it an exemption under conditions of short supply. We are of the opinion that there is no need for in-depth consideration of such a measure, as it so clearly raises a number of problems. The administration of such a measure appears problematic. As well, a problem of abuse by importers might be created. Further, such a measure will distort the rules of supply and demand. Lastly, an exemption under conditions of short supply will violate the very principles of assessing anti-dumping and countervailing duties.

Benoît Sauvageau
Member of Parliament for Terrebonne

Reform Party Dissenting Opinion on the Report on the *Special Import Measures Act*

December 10, 1996

The Reform Party is in agreement with the broad thrust of the report produced by the Liberal members of the Committee. We have no disagreement with the technical analysis, interpretation of the testimony and recommendations. We are particularly pleased with the recommendations which involve a more precise definition of public interest in the consideration of SIMA measures and which urge that proper weight be given to lesser duties and short supply in the deliberations of the CITT.

Our main comments concern the political and economic context within which the hearings were held. It is our understanding that the review process was initiated by complaints by the Canadian steel industry which feels that it has been subjected to undue harassment by the US anti-dumping trade legislation and process and that it feels such harassment should be dealt with by the use of similar tactics by the Canadian authorities.

We can understand the frustration of those subjected to such harassment and agree that it damages the welfare of not only the industry involved but also all Canadians. This is so especially if it induces firms to open subsidiaries in the US which otherwise would be located in Canada where production is more efficient on economic grounds. The question is how it can be reduced or stopped. We offer the following in response.

First, Canada is sitting in a glass-house concerning the use of SIMA. According to the statistics supplied by the Department of Finance in response to a request by Herb Grubel, between 1985-95 Canada took 52 actions against US importers while the US took only 29 against Canadian importers. Findings which resulted in either definitive duties or price undertakings number 31 in Canada (55 percent) and 14 in the US (48 percent). Perhaps most telling is the value of imports subject to duty: $258 million for Canadian imports and $192 million for US imports (average annual values). The share of Canada's import subject to such duties was 0.3 percent while it was less than half that at 0.16 percent in the US.

These statistics do not suggest that Canada has a very strong case in complaining about the excessive use of anti-dumping legislation in the United States. This fact, of course is cold comfort to specific Canadian firms and industries which find themselves involved in frequent, costly and protracted litigation with the US authorities.

For policy the main implication of these facts is that in the US we have a large constituency of firms that should be interested in supporting efforts to move towards the complete elimination of all trade remedy legislation in NAFTA. Such efforts have not been productive until now. However, we

believe that they should be continued and aimed at mobilizing all commercial and political interests damaged by US actions. The outcry in the US over the higher house-prices resulting from the soft-wood lumber agreement seems to offer the opportunity for an offensive along these lines.

We also note the history of protection and the move towards free trade. The arguments about the need for SIMA protection made by witnesses at the hearings were identical to those heard for literally decades whenever the idea of lower tariffs and quotas was discussed, in Canada as well as the US. In spite of the persuasive arguments made by the proponents of protection in both countries, NAFTA and successive GATT rounds of trade liberalization did take place. The forces of protectionism lost because a number of intellectual, commercial and political forces were favourable at a certain time. The confluence of these forces and their ultimate influence was perceived only very vaguely and surprised many.

We believe that persistence in the pursuit of the goal of ridding NAFTA of anti-dumping and subsidy legislation for intra-regional trade will ultimately bear fruit and we encourage the Government of Canada to continue its efforts in this field.

Second, it is in the power of the Government of Canada to make it easier for Canadian firms to initiate SIMA actions, to make it more difficult and costly for US importers to meet SIMA demands and to get the CITT to find in favour of Canadian firms more often, either through different emphasis in the interpretation of existing rules or new rules.

No one can be certain on the reaction of the US government which such initiatives would elicit. On the one side of the issue we heard witnesses, mainly representing the employers and workers of the steel industry, who were firmly convinced that "making the road as bumpy on this side of the border as it is on the other" would bring US legislators to the bargaining table and ultimately ease their life. We respect the views of these individuals, but are concerned about the risks of such a strategy.

US legislators could just as easily respond to an aggressive Canadian policy by digging in their heels and making life more difficult for Canadian exporters. They could use the same techniques for doing so proposed by those who want Canada to become tougher. Such a US response could be very damaging to a wide range of Canadian exporters. And since we rely so much more on exports than do the Americans, the damage to the entire economy in such a process of escalating SIMA type trade disputes could damage seriously the entire Canadian economy.

Witnesses from the Canadian Departments of Industry, Trade and Revenue who are in frequent contact with US officials through their responsibilities for administering SIMA trade disputes were asked to give their strictly personal views on the likelihood that "getting tough" with the Americans would produce the results expected by the representatives of the steel industry. All of them expressed the judgement that such a policy would probably not succeed and that it carried serious risks for the existing trade relationship.

We share this opinion and urge the government to resist the demand for getting tough measures with the Americans and instead recommend intensification of official and industry efforts to identify downstream users of Canadian imports that are injured by US anti-dumping and subsidy legislation. With the help of these interests US legislators should be lobbied to ease administrative procedures and ultimately remove the offensive legislation on all intra-regional trade of NAFTA.

Herb Grubel, MP
Reform Party Finance Critic

Charlie Penson, MP
Reform Party International Trade Critic

Minutes of Proceedings

MONDAY, DECEMBER 9, 1996
(Meeting No. 9)

[*Text*]

The Sub-Committee on the *Review of the Special Import Measures Act* (SIMA) of the Standing Committee on Finance and the Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade met jointly *in camera* at 3:37 p.m., this day, in Room 306, West Block, the Co-Chairs, Ron Duhamel and Hon. Michel Dupuy, presiding.

Members of the Sub-Committee on the Review of the Special Import Measures Act of the Standing Committee on Finance present: Ron Duhamel and Herb Grubel.

Acting Members present: Barry Campbell for Susan Whelan; Bob Speller for Brent St. Denis.

Members of the Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade present: Hon. Michel Dupuy and Sarkis Assadourian.

Acting Member present: Philippe Paré for Benoît Sauvageau.

In attendance: Dr. Gilbert Winham, Consultant. *From the Research Branch of the Library of Parliament:* Daniel Dupras, Research Officer.

In accordance with Standing Order 108(2), and their Orders of Reference of June 5, 1996, of the Standing Committee on Finance and of May 9, 1996, of the Standing Committee on Foreign Affairs and International Trade, the Sub-Committees resumed their examination of the *Special Import Measures Act (See Minutes of Proceedings, Issue No. 2, Meeting No. 18 of Wednesday, June 5, 1996 (SIMA);* and *Issue No. 3, Meeting No. 22, of Thursday, May 9, 1996).*

The Sub-Committees met *in camera* to consider a draft report on the *Special Import Measures Act.*

By unanimous consent, it was agreed,—That Ms. Caroline Emond, Parliamentary Assistant to Mr. Benoît Sauvageau address the Sub-Committees, on the proposed amendments to the report by the Bloc Québécois.

At 3:45 p.m., the sitting was suspended.

At 3:55 p.m., the sitting resumed.

By unanimous consent, it was agreed,—That the Co-Chairs be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Report.

By unanimous consent, it was agreed,—That each Sub-Committee print through their respective Standing Committee, a minimum of 550 copies of this report, as allowed by the Board of Internal Economy rules, for a total of 1,100 copies for both Sub-Committees.

Mr. MacDonald moved,—That Members of the Opposition be authorized to append to the report their dissenting opinions or supplementary opinions, or recommendations, such opinions or recommendations shall not be longer than two pages (with the same font and lines spacing as in the main report).

After debate, Mr. Campbell moved an amendment thereto,—That the motion be amended by deleting the words "not be longer than two pages" and substituting the following "be up to five pages".

After debate, the question was put on the amendment, and it was agreed to, on the following division:

YEAS:

Barry Campbell
Herb Grubel
Ron MacDonald (3).

NAYS:

Bob Speller
Philippe Paré (2).

After debate, the question was put on the motion, as amended, and it was agreed to, on the following division:

YEAS:

Barry Campbell
Herb Grubel
Ron MacDonald (3).

NAYS:

Bob Speller
Philippe Paré (2).

By unanimous consent, it was agreed,—That the report, as amended, be adopted by the Sub-Committees. The Sub-Committees recommend the adoption of the said report by their respective Standing Committee and request that it be jointly tabled in the House, prior to it's adjournment for the holidays, by the Chair of each Standing Committee.

At 5:57 p.m., the Sub-Committees adjourned to the call of the Chair.

Georges Etoka
Clerk of the Sub-Committee

TUESDAY, DECEMBER 10, 1996
(Meeting No. 78)

[*Translation*]

The Standing Committee on Finance met *in camera* at 3:33 p.m. this day in Room 112-N, Centre Block, the Chairman, Jim Peterson, presiding.

Members of the Committee present: Leon Benoit, Dianne Brushett, Ron Duhamel, Herb Grubel, Jim Peterson, Gary Pillitteri, Brent St. Denis and Susan Whelan.

Acting Members present: Roy Cullen for Ron Fewchuk and Philippe Paré for Yvan Loubier.

In attendance: From the Research Branch of the Library of Parliament: Marion Wrobel and Richard Domingue, Research Officers. *From the Committees and Parliamentary Associations Directorate*: Bev Isles.

In accordance with its mandate under Standing Order108(2), consideration of the report of the Sub-Committee on the *Special Import Measures Act* (SIMA).

The Committee considered the report adopted by its Sub-Committee.

It was agreed,—That the report be adopted as the Sixth Report of the Committee.

It was agreed,—That the Committee authorize the printing of dissenting opinions appended to this report immediately following the signature of the Chair.

It was agreed,—That 550 copies be printed.

It was ordered,—That the Sixth Report be tabled as soon as possible.

At 3:47 p.m., the Committee adjourned to the call of the Chair.

Martine Bresson
Clerk of the Committee

TUESDAY, DECEMBER 10, 1996
(Meeting No. 61)

[*Text*]

The Standing Committee on Foreign Affairs and International Trade met *in camera* at 3:42 o'clock p.m. this day, in Room 208, West Block, the Vice-Chair, John English, presiding.

Members of the Committee present: Sarkis Assadourian, Stéphane Bergeron, Hon. Michel Dupuy, John English, Jesse Flis, Beryl Gaffney, Francis G. LeBlanc, John Loney, Bob Mills, Lee Morrison and Bob Speller.

Associate Member present: Ron MacDonald.

In attendance: From the Research Branch of the Library of Parliament: Gerald Schmitz and Daniel Dupras, Researchers.

Witnesses: From the Department of Foreign Affairs and International Trade: Michael Bell, Special Representative for NATO Enlargement. *From the Department of National Defence:* Rear Admiral J. King, Associate Assistant Deputy Minister, Policy; Roman Jakobow, Director, Strategic Analysis.

In accordance with its mandate under Standing Order 108(2), the Committee proceeded to examine the Report of the Sub-Committee on Trade Disputes regarding the review of the *Special Import Measures Act*.

It was moved,—That, as Radio Canada International provides an essential link to the world for millions of Canadians, also provides information on Canada to Canadians travelling abroad and is an important medium to present Canada and Canadians to the rest of the world.

Be it resolved that the Standing Committee on Foreign Affairs and International Trade urge the appropriate departments of the government to provide continuous and adequate financial support to Radio Canada International for the next three years.

And debate arising thereon.

It was moved,—That the motion be amended by adding in the second paragraph after the words "urge the", the following: "CBC and the".

After debate, the question being put on the amendment, it was agreed to.

And the question being put on the motion, it was agreed to, as amended.

It was moved,—That the Report of the Sub-Committee on Trade Disputes regarding the review of the *Special Import Measures Act* be adopted as the Fourth Report of the Committee and that the report be presented to the House on December 11, 1996.

And debate arising thereon.

And the question being put on the motion, it was agreed to.

It was agreed,—That the Committee print, in a bilingual tumbled format, 550 copies of its report.

It was agreed,—That pursuant to Standing Order 109, the Committee request that the government table a comprehensive response to this report.

At 4:08 o'clock p.m., the sitting was suspended.

At 4:15 o'clock p.m., the sitting resumed in public.

In accordance with its mandate under Standing Order 108(2), the Committee resumed its consideration of NATO expansion. (*See Minutes of Proceedings dated Thursday, October 10, 1996, Issue No. 6.*)

Michael Bell and Rear Admiral King each made statements and, with the other witness, answered questions.

It was agreed,—That following the Christmas recess, the Committee convene a further hearing on NATO enlargement.

At 5:28 o'clock p.m., the Committee adjourned to the call of the Chair.

Janice Hilchie
Clerk of the Committee